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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 00 170 51281 Office: VERMONT SERVICE CENTER Date: JAN 30 2003

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation engaged in management and computer consulting services. It seeks to employ the beneficiary as its president and chief technical officer. Accordingly, it seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the Service decision was based on the old, less flexible definitions of the terms "manager," "executive," and "executive capacity."

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
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> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the

United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

> (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:
>
> (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
>
> (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
>
> (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
>
> (D) The prospective United States employer has been doing business for at least one year.

The petitioner was incorporated in the State of New Jersey in July of 1995. The petitioner claims that the beneficiary owns all its outstanding shares. The petitioner also claims the beneficiary owns 95 percent of a Turkish foreign entity identified as Promin Computer Technologies Company, Ltd. and thus it and the foreign entity are affiliated. The petition was filed in May of 2000.

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment

within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner stated in the petition that it had 60 employees worldwide and 2 employees in the United States. The petition indicated the beneficiary's salary would be $150,000 per year. The petitioner also provided a letter in support of its petition signed by a vice-president. The letter provided the following

information regarding the beneficiary's duties:

> [The beneficiary has] met with management level employees of client companies and observes [sic] operations of select target organizations, conducted detailed market and financial analyses of select target organizations and he has reported his findings directly to the Company's Board of Directors and continued to have full responsibility for Promin's worldwide operations.

The letter also stated the following in regard to the beneficiary's proposed responsibilities:

> As the President and Chief Technical Officer for U.S. Operations, [the beneficiary] shall continue to meet with other of Promin's managers and executives and supervise the employees in the technical support department and continue to build and hone Promin's U.S. Office and base of clients while providing the highest possible quality technical support on Promin's products throughout the United States; and technical support rendered by telephone, correspondence and through electronic mail; and on-site support for installation, maintenance and training of products; and project planning and design; and system analysis; and programming and documentation. [The beneficiary] shall also communicate with other of Promin's upper-level managers to develop strategic planning goals for Promin's U.S. business operations.

The petitioner also provided its 1998 Internal Revenue Service Form 1120-A, U.S. Corporation Short-Form Income Tax Return. The IRS Form 1120-A for 1998 reflected gross receipts in the amount of $38,846 and that no compensation had been paid to officers and that no salaries had been paid to employees.

The petitioner also noted that the beneficiary belonged to the American Management Association, the Institute of Electrical and Electronics Engineers Computer Society, and Rotary International.

The director requested the names, job titles, and yearly salaries of all the employees at the petitioner's office in New Jersey as well as a description of the management chain of command. The director also requested copies of the New Jersey office's most recently filed quarterly income tax return and Form W-2 Wage and Tax Statements from the New Jersey office.

In response, the petitioner through its counsel referenced Promin (USA) employees as well-trained, dedicated, and highly motivated experts who receive continuous training on new system protocols. The petitioner also provided its organizational chart depicting the positions of chief executive officer and chairman, vice-

president, executive secretary, and three departments.

The director determined that the petitioner had not established that the beneficiary would be employed in an executive or managerial capacity.

On appeal, counsel for the petitioner asserts that the beneficiary is a functional manager. Counsel also asserts that the beneficiary serves in both an executive and managerial capacity because first, the beneficiary maintains and delegates the authority to hire and fire; second, the beneficiary receives a level of compensation from the Promin organization that is commensurate with his managerial and executive positions; third, the beneficiary is a member of professional organizations; and fourth, he is the chairman of the Board of the Promin Group and as the president, sole shareholder, president and chief technical officer of Promin USA, he directs the day-to-day operations of the Promin organization and directs several professional staff members within other departments in the organization.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). The petitioner's job description of the beneficiary's duties for the United States company most clearly demonstrates that the beneficiary's duties are those of an individual performing basic services for the company. The beneficiary conducts market and financial analysis and continues to build the petitioner's base of clients. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988). Counsel's examples of how the beneficiary is a manager and an executive bear little relation to the definitions of managerial and executive capacity set forth in the Act. The beneficiary's ability to hire and fire staff is but one element contained in the definition of managerial capacity. Moreover, the petitioner has not provided any supporting documentation that it employs anyone that may have been hired or been fired by the beneficiary. The petitioner has provided no evidence of a subordinate staff employed by the petitioner that would relieve the beneficiary from performing the non-qualifying duties of the petitioner. Counsel does not relate how the salary of a beneficiary[1] and membership in professional organizations relate to specific elements of managerial or executive capacity. Further, as counsel notes in his brief the definitions of managerial and executive capacity look beyond titles and address the employee's

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[1] The petitioner has provided a letter indicating that the beneficiary's salary is paid by the claimed foreign entity in this case. This fact is confirmed by counsel and will be discussed in more detail below.

primary activities. In the case at hand, neither counsel nor the petitioner has provided the Service with a comprehensive description of the beneficiary's job duties that convey an understanding of what the beneficiary is doing for the petitioner on a daily basis. As noted above, the most that can be gleaned from the petitioner's description of the petitioner's activities is that he is performing basic services for the petitioner.

Counsel's assertion that the beneficiary is a functional manager is without merit. Counsel neglects to specify what function the beneficiary supposedly manages and the petitioner has provided no supporting documentation in support of this assertion. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec.533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Upon review, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties fail to describe the actual day-to-day duties of the beneficiary. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not established that a qualifying relationship exists between the petitioner and the claimed affiliated foreign company. The petitioner provides only a translated document indicating that the beneficiary and another individual have signature authorization on behalf of the foreign entity in this case. Other than the unsupported statements made by the petitioner, there is no evidence demonstrating the ownership of the foreign entity.

The petitioner also has not established its ability to pay the beneficiary the offered salary of $150,000 per year. The petitioner and counsel both confirm that the beneficiary will be paid his salary by a foreign entity.

8 C.F.R 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The prospective United States employer must pay the beneficiary the proffered wage not the foreign entity. The petitioner has not provided any supporting documentation that evidences that it has ever paid the beneficiary a salary. The petitioner's 1998 IRS Form 1120-A does not reveal that the petitioner had net income that was at least equal to the proffered wage. Further, the petitioner's IRS Form 1120-A does not reflect that the petitioner has sufficient net current assets to pay the proffered wage. The petitioner has not provided any subsequent tax returns or other independent evidence that reflects its ability to pay the beneficiary the proffered wage.

The petitioner also has not provided evidence that it was doing business at the time the petition was filed in May of 2000.

8 C.F.R. 214.2(l)(1)(ii)(H) states:

> *Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner has not provided sufficient evidence that it is engaged in business. The petitioner has not provided its tax returns for 1999 or 2000. The petitioner has not provided bank statements, agreements, invoices, or other documentation that would support a conclusion that it was engaged in doing business after 1998.

For these additional reasons the petition may not be approved.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.